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BY *[Signature]*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SIXTO Q. NAVARETTE,
BOP #20463-298

Plaintiff,

vs.

PIONEER MEDICAL CENTER; U.S.
MARSHAL'S SERVICE; FEDERAL
BUREAU OF PRISON; DR. MARK
WHITE,

Defendants.

Civil No. 12cv0629 WQH (DHB)

ORDER:

- (1) GRANTING PLAINTIFF'S MOTION TO PROCEED IN *FORMA PAUPERIS* AND GARNISHING BALANCE FROM INMATE'S TRUST ACCOUNT PURSUANT TO 28 U.S.C. § 1915(a); and
- (2) SUA SPONTE DISMISSING COMPLAINT PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

Plaintiff, Sixto Q. Navarette, a federal inmate currently incarcerated at Victorville Federal Corrections Institution located in Adelanto, California, has filed a civil rights action pursuant to 42 U.S.C. § 1983. In addition, Plaintiff has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [ECF No. 5].

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1 **I. MOTION TO PROCEED IFP**

2 All parties instituting any civil action, suit or proceeding in a district court of the United States,
 3 except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C.
 4 § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if the
 5 plaintiff is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v.*
 6 *Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, prisoners granted leave to proceed IFP
 7 remain obligated to pay the entire fee in installments, regardless of whether their action is
 8 ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2).

9 The Court finds that Plaintiff has submitted an affidavit which complies with 28 U.S.C.
 10 § 1915(a)(1), and that he has attached a certified copy of his trust account statement pursuant to
 11 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement shows that
 12 he has insufficient funds from which to pay filing fees at this time. *See* 28 U.S.C. § 1915(b)(4).
 13 Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [ECF No. 5] and assesses no
 14 initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the
 15 filing fee mandated shall be collected and forwarded to the Clerk of the Court pursuant to the
 16 installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

17 **II. SUA SPONTE SCREENING PER 28 U.S.C. § 1915(e)(2) and § 1915A**

18 **A. Standard**

19 The PLRA also obligates the Court to review complaints filed by all persons proceeding
 20 IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused
 21 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or
 22 conditions of parole, probation, pretrial release, or diversionary program," "as soon as
 23 practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these
 24 provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion
 25 thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from
 26 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203
 27 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443,
 28 446 (9th Cir. 2000) (§ 1915A).

1 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
 2 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is
 3 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,
 4 324 (1989). However 28 U.S.C. §§ 1915(e)(2) and 1915A now mandate that the court reviewing
 5 an IFP or prisoner's suit make and rule on its own motion to dismiss before effecting service of
 6 the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 (“[S]ection
 7 1915(e) not only permits, but requires a district court to dismiss an in forma pauperis complaint
 8 that fails to state a claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)
 9 (discussing 28 U.S.C. § 1915A).

10 “[W]hen determining whether a complaint states a claim, a court must accept as true all
 11 allegations of material fact and must construe those facts in the light most favorable to the
 12 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 13 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, the Court’s
 14 duty to liberally construe a pro se’s pleadings, *see Karim-Panahi v. Los Angeles Police Dept.*,
 15 839 F.2d 621, 623 (9th Cir. 1988), is “particularly important in civil rights cases.” *Ferdik v.
 16 Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992).

17 **B. Claims brought pursuant to § 1983**

18 In his Complaint, Plaintiff alleges that on February 2, 2010, he was “taken to Pioneers
 19 Memorial Hospital” where he was “admitted to the emergency department.” (Compl. at 2.)
 20 Plaintiff claims that he underwent an operation that was not “performed correctly” by Defendant
 21 White. (*Id.*) Although not entirely clear, it appears that Plaintiff was not incarcerated at the time
 22 these events arose.

23 Plaintiff seeks to hold Defendants Pioneers Memorial Hospital and Defendant White
 24 liable pursuant to 42 U.S.C. § 1983. Section 1983 imposes two essential proof requirements
 25 upon a claimant: (1) that a person acting under color of state law committed the conduct at
 26 issue, and (2) that the conduct deprived the claimant of some right, privilege, or immunity
 27 protected by the Constitution or laws of the United States. *See* 42 U.S.C. § 1983; *Parratt v.*
 28

1 *Taylor*, 451 U.S. 527, 535 (1981), overruled on other grounds by *Daniels v. Williams*, 474 U.S.
 2 327, 328 (1986); *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985) (en banc).

3 To the extent Plaintiff seeks to hold either of these Defendants liable pursuant to § 1983,
 4 his Complaint fails to allege any facts sufficient to show that a private entity or their employee
 5 acted “under color of state law.” *Franklin*, 312 F.3d at 444; see also *Kirtley v. Rainey*, 326 F.3d
 6 1088, 1092 (9th Cir. 2003) (“While generally not applicable to private parties, a § 1983 action
 7 can lie against a private party” only if he is alleged to be “a willful participant in joint action with
 8 the State or its agents.”) (citation and quotation marks omitted). If Plaintiff were incarcerated
 9 at the time he was admitted to Pioneers Memorial Hospital, he may be able to pursue a § 1983
 10 claim against Defendant White but he will have to clarify his status in an Amended Complaint.¹

11 **C. Bivens Action**

12 In addition, the Court notes that while Plaintiff purportedly brings this action under
 13 § 1983, the Court will liberally construe some of his claims to arise under *Bivens v. Six Unknown
 14 Named Fed. Narcotics Agents*, 403 U.S. 388 (1971) because Plaintiff claims violations of his
 15 civil rights by a federal actors. *Bivens* established that “compensable injury to a constitutionally
 16 protected interest [by federal officials alleged to have acted under color of federal law] could be
 17 vindicated by a suit for damages invoking the general federal question jurisdiction of the federal
 18 courts [pursuant to 28 U.S.C. § 1331].” *Butz v. Economou*, 438 U.S. 478, 486 (1978). “Actions
 19 under § 1983 and those under *Bivens* are identical save for the replacement of a state actor under
 20 § 1983 by a federal actor under *Bivens*.” *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991).

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 24 ¹ Based on the current allegations, even if Plaintiff were incarcerated when he underwent surgery
 25 by Defendant White, his allegations fail to rise to the level of an Eighth Amendment violation.
 26 Plaintiff’s allegations sound in negligence. In general, deliberate indifference may be shown when
 27 prison officials deny, delay, or intentionally interfere with a prescribed course of medical treatment, or
 28 it may be shown by the way in which prison medical officials provide necessary care. *Hutchinson v.
 United States*, 838 F.2d 390, 393-94 (9th Cir. 1988). Before it can be said that an inmate’s civil rights
 have been abridged with regard to medical care, however, “the indifference to his medical needs must
 be substantial. Mere ‘indifference,’ ‘negligence,’ or ‘medical malpractice’ will not support this cause
 of action.” *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir. 1980) (citing *Estelle v.
 Gamble*, 429 U.S. 97, 105 - 106 (1976). See also *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir.
 2004).

1 To state a private cause of action under *Bivens*, Plaintiff must allege: (1) that a right
 2 secured by the Constitution of the United States was violated, and (2) that the violation was
 3 committed by a federal actor. *Id.*; *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 624
 4 (9th Cir. 1988). *Bivens* provides that “federal courts have the inherent authority to award
 5 damages against federal officials to compensate plaintiffs for violations of their constitutional
 6 rights.” *Western Center for Journalism v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir. 2000).
 7 However, a *Bivens* action may only be brought against the responsible federal official in his or
 8 her individual capacity. *Daly-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1988). In his
 9 Complaint, Plaintiff seeks to sue the United States Marshal Service and the Federal Bureau of
 10 Prison which are agencies of the government. (See Compl. at 1.) However, *Bivens* does not
 11 authorize a suit against the government or its agencies for monetary relief. *FDIC v. Meyer*, 510
 12 U.S. 471, 486 (1994); *Thomas-Lazear v. FBI*, 851 F.2d 1202, 1207 (9th Cir. 1988); *Daly-*
 13 *Murphy*, 837 F.2d at 355. Accordingly, the Court must DISMISS the claims against the United
 14 States Marshal Service and the Federal Bureau of Prison for failing to state a claim upon which
 15 relief may be granted.

16 Plaintiff raises allegations relating to the time that he spent incarcerated at a private
 17 facility, the Western Regional Detention Facility, and claims that he suffered from inadequate
 18 medical care. (See Compl at 5-6.) However, *Bivens* does not provide a remedy for alleged
 19 wrongs committed by a private entity alleged to have denied Plaintiff’s constitutional rights
 20 under color of federal law. *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 69 (2001)
 21 (“[T]he purpose of *Bivens* is to deter *the officer*,’ not the agency.”) (quoting *Meyer*, 510 U.S.
 22 at 485); *Malesko*, 534 U.S. at 66 n.2 (holding that *Meyer* “forecloses the extension of *Bivens* to
 23 private entities.”). Accordingly, Plaintiff cannot bring claims of civil rights violations against
 24 the Western Regional Detention Facility.

25 In addition, the Supreme Court recently held that a prisoner cannot bring a *Bivens* action
 26 against an employee of a private entity for damages pursuant to alleged Eighth Amendment
 27 violations. See *Minneci v. Pollard*, 132 S.Ct. 617, 626 (2012).

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1 In *Minneci*, the Supreme Court held that

2 [W]here “a federal prisoner seeks damages from privately employed personnel working
3 at a privately operated federal prison, where the conduct allegedly amounts to a violation
4 of the Eighth Amendment, and where that conduct is a kind that typically falls within the
5 scope of traditional state tort law (such as the conduct involving improper medical care
6 at issue here), the prisoner must seek a remedy under state tort law. We cannot imply a
7 *Bivens* remedy in such a case.”

8 *Id.*

9 Accordingly, Plaintiff’s entire Complaint must be dismissed for failing to state a claim
10 upon which section 1983 relief may be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii) & 1915A(b).

11 **III. CONCLUSION AND ORDER**

12 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

13 1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No. 5] is
14 **GRANTED**.

15 2. The Warden, or his designee, shall collect from Plaintiff’s prison trust account the
16 \$350 balance of the filing fee owed in this case by collecting monthly payments from the account
17 in an amount equal to twenty percent (20%) of the preceding month’s income and forward
18 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
19 accordance with 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS SHALL BE CLEARLY**
20 **IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.**

21 3. The Clerk of the Court is directed to serve a copy of this Order on Warden,
22 Victorville Federal Corrections Institution, P.O. Box 5400, Adelanto, California 92301.

23 **IT IS FURTHER ORDERED** that:

24 4. Plaintiff’s Complaint is **DISMISSED** without prejudice for failing to state a claim
25 upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b).
26 However, Plaintiff is further **GRANTED** forty five (45) days leave from the date this Order is
27 filed in which to file a First Amended Complaint which cures all the deficiencies of pleading
28 noted above. Plaintiff’s Amended Complaint must be complete in itself without reference to
his previous pleading. *See* S.D. CAL. CivLR 15.1. Defendants not named and all claims not re-

1 alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*, 814 F.2d 565,
2 567 (9th Cir. 1987).

3 5. The Clerk of Court is directed to mail a court approved form civil rights complaint
4 to Plaintiff.

5 **IT IS SO ORDERED.**

6 DATED: 7/10/12


7 HON. WILLIAM O. HAYES
8 United States District Judge

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